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149

5-95-900
Supr. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 99

ILLINOIS STEEL COMPANY, PETITIONER,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT

PETITION FOR CERTIORARI FILED JUNE 11, 1943.

CERTIORARI GRANTED OCTOBER 11, 1943.

SUPREME COURT OF THE UNITED STATES

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 26, 1943.

—8616

[fol. 1]

IN THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FEBRUARY TERM, 1942

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

ILLINOIS STEEL COMPANY, a Corporation, Defendant

Appeal from Superior Court, Cook County

Honorable Francis B. Allegretti, Judge Presiding

Abstract of Record—Filed January 13, 1942

Placita.

Complaint. (Afterwards amended.)

Summons and return.

Appearance of Knapp, Beye, Allen, Cochran & Cushing, Attorneys for defendant, filed February 13, 1934.

Notice to defendant of motion by plaintiff for order for leave to file Amended Complaint filed February 28, 1934.

Order dated February 28, 1934, giving leave to plaintiff to file Amended Complaint instanter and rule on defendant to answer within 20 days.

Amended Complaint at law filed February 28, 1934, omitting caption, as follows:

[fol. 2] AMENDED COMPLAINT

The Baltimore and Ohio Railroad Company, a corporation, plaintiff, by H. D. Sheean and E. W. Lademann, its attorneys, leave of court having been first had, files this its Amended Complaint, complaining of the Illinois Steel Company, defendant, and alleges:

1. That the plaintiff is a common carrier by railroad operating a line of railroad through the various states of the United States, and in particular from Chicago, Illinois, eastward to Baltimore, Maryland:

2. That as such common carrier it has published and filed with the Interstate Commerce Commission its classifi-

cation, rates and tariffs for the transportation of goods over its line of railroad.

3. That the defendant corporation has a steel mill located at Gary, Indiana, from which point it makes large shipments of ammonia sulphate.

4. That on various dates between August 9th, 1929 and February 18, 1931, it made a large number of shipments of ammonia sulphate from Gary, Indiana, to Baltimore, Maryland.

5. That the various dates on which the shipments were made appear on the statement attached hereto marked "Exhibit A" and made a part hereof.

6. That said shipments were loaded in cars at the plant of the defendant company at Gary, Indiana, and delivered to the Elgin, Joliet & Eastern Railway Company, which railway company delivered said cars to the plaintiff herein to complete the transportation to Baltimore, Maryland.

[fol. 3] 7. That the defendant prepaid the sum of Twenty-one thousand, two hundred fifty-two Dollars and thirty-seven cents ($21,252.37), being a portion of the lawful charges for transporting said shipments from Gary, Indiana, to Baltimore, Maryland, to the Elgin, Joliet & Eastern Railway Company, but has refused and still refuses to pay the full lawful charges amounting to Twenty-nine thousand, two hundred twenty Dollars and eighty-one cents ($29,220.81), as more fully appears from said "Exhibit A"; which exhibit also shows the date of shipment, the waybill number, initial of car and number, the weight of the shipment, the proper lawful rate, the proper lawful charges, the amounts paid by the defendant and the balance still due on each shipment; wherefore there is due this plaintiff from the defendant the sum of Seven thousand, nine hundred sixty-eight Dollars and forty-four cents ($7,968.44).

8. Wherefore, the plaintiff demands judgment against the defendant in the sum of Ten Thousand Dollars ($10,000.00).

H. D. Sheean & E. W. Lademann, Attorneys for Plaintiff, 315 Grand Central Station, Chicago, Illinois.

[fol. 4] EXHIBIT "A" TO AMENDED COMPLAINT.

SHIPMENTS OF SULPHATE OF AMMONIA FROM GARY, IND., AND JOLIET, ILL., SHIPPED BY ILLINOIS STEEL COMPANY.

Waybill Date	Waybill Number	Car Int. and Number	Weight	Proper Lawful Rate	Proper Lawful Charge	Amounts Paid by Defendant	Balance Due
8/ 9/29	1984	HV-34440	77,660	38.5	$228.99	$217.45	$81.54
	1985	B&O-268031	88,120	38.5	339.26	246.74	92.52
	1986	DH-51333	80,320	38.5	309.23	224.90	84.33
	1987	CMStP-709048	76,360	38.5	293.99	213.81	80.18
8/10/29	2189	B&O-503978	80,740	38.5	310.85	226.07	84.78
	2190	GN-31455	82,720	38.5	318.47	231.62	86.85
	2191	Q-95429	80,400	38.5	309.54	224.12	84.42
	2192	PC Co. 37176	82,200	38.5	316.47	230.16	86.31
	2193	EJE-7341	77,380	38.5	297.91	216.66	81.25
	2194	7626	81,680	38.5	314.47	228.70	85.77
	2195	7491	78,440	38.5	301.99	219.63	82.36
	2244	NYC-150952	86,540	38.5	333.18	242 31	90.87
	2245	NYCStL-16216	77,810	38.5	299.57	218.06	81.51
10/31/30	2983	CNW-110236	82,200	38.5	316.47	230.16	86.31
	2987	StP-708539	81,320	38.5	313.08	227.70	85.38
	2991	CNW-127248	82,100	38.5	316.09	229.88	86.21
	2988	48150	81,000	38.5	311.85	226.80	85.05
	2989	145352	79,920	38.5	307.69	223.78	83.91
	2992	Q-25200	98,900	38.5	380.77	276.92	103.85
	2994	STP-702368	77,940	38.5	300.07	218.23	81.84
	2990	EJE-60054	101,460	38.5	390.62	284.09	106.53
	2985	GN-34778	81,420	38.5	313.47	227.98	85.49
	2986	SLine-134466	83,580	38.5	321.78	234.02	87.76
	2984	CGW-27570	83,420	38.5	321.17	233.58	87.59
	2993	EJE-7337	77,340	38.5	297.76	216.55	81.21
10/30/30	2864	7386	80,300	38.5	309.16	224.84	84.32
	2868	StP-711283	78,340	38.5	301.61	219.35	82.26
	2871	CRIP-154501	79,860	38.5	307.46	223.61	83.85
	2867	CStP-505394	82,460	38.5	317.47	230.89	86.58
	2873	StLFS-161303	81,860	38.5	315.61	229.21	86.40
	2866	NP-47025	82,320	38.5	316.93	230.50	86.43
	2871	OSL-138242	104,940	38.5	404.02	293.83	110.19
	2870	CNW-37948	80,020	38.5	308.08	224.06	84.02
	2872	NP-39351	81,102	38.5	312.31	227.14	85.17
	2863	ATSF-119051	84,020	38.5	323.48	236.26	87.22
	2869	RI-140657	100,100	38.5	385.39	280.28	105.11
	2865	Q-132876	81,080	38.5	312.16	227.02	85.14
2/10/31	846	EJE-7705	80,080	38.5	308.31	224.22	84.09
2/ 5/31	362	60284	99,720	38.5	383.92	279.22	104.70
	358	60289	102,100	38.5	393.09	285.88	107.21
	365	7703	79,520	38.5	306.15	222.66	83.49
	360	7309	81,620	38.5	314.24	228.54	85.70
	363	60309	90,540	38.5	348.38	253.51	95.07
	366	7615	81,400	38.5	313.39	227.92	85.47
	364	80216	89,840	38.5	345.88	251.55	94.33
	361	7554	81,760	38.5	314.78	228.93	85.85
	356	60285	92,700	38.5	356.90	259.56	97.34
	359	60316	102,200	38.5	393.47	286.16	107.31
	357	60376	101,000	38.5	388.85	282.80	106.05
[fol. 5]							
2/18/31	1801	CMStP-708400	71,620	38.5	$275.74	$200.54	$75.20
	1804	EJE-60300	87,700	38.5	337.65	245.56	92.09
	1791	CMStP-713207	87,100	38.5	335.34	243.88	91.46
	1798	CCC-56624	70,520	38.5	271.50	197.46	74.04
1/24/31	2334	EJE-7698	79,460	38.5	305.92	222.49	83.43
	2335	7632	77,400	38.5	297.99	216.72	81.27

EXHIBIT "A" TO AMENDED COMPLAINT—Continued

SHIPMENTS OF SULPHATE OF AMMONIA FROM GARY, IND., AND JOLIET, ILL., SHIPPED BY ILLINOIS STEEL COMPANY.

Waybill Date	Waybill Number	Car Int. and Number	Weight	Proper Lawful Rate	Proper Lawful Charge	Amounts Paid by Defendant	Balance Due
	2336	60153	77,940	38.5	$300.07	$218.23	$81.84
	2337	60136	81,060	38.5	312.08	226.97	85.11
	2338	60312	100,140	38.5	385.54	280.39	105.15
	2339	60371	103,200	38.5	397.32	288.96	108.36
	2340	7379	74,980	38.5	288.67	209.94	78.73
	2341	60237	79,300	38.5	305.31	222.04	83.27
	2342	CMStP-711622	85,980	38.5	331.02	240.74	90.28
	2343	503265	89,200	38.5	343.42	249.76	93.66
	2344	RI-140100	80,420	38.5	309.62	225.18	84.44
	2345	CNW-146714	82,540	38.5	317.78	231.11	86.67
2/18/31	1800	NP-27724	78,100	38.5	300.69	218.68	82.01
	1802	CMStP-711934	71,960	38.5	277.05	201.49	75.56
	1794	Q-98637	81,980	38.5	315.62	229.54	86.08
	1795	PRR-565846	85,000	38.5	327.25	238.00	98.25
	1792	CNW-100752	83,920	38.5	323.09	234.98	88.11
	1797	NP-94356	80,860	38.5	311.31	226.41	84.90
	1793	MC-64963	83,020	38.5	319.63	232.46	87.17
	1803	EJE-7476	89,820	38.5	345.81	251.50	94.31
	1799	E-75584	74,520	38.5	286.90	208.66	78.24
2/13/31	1287	NStL-24222	81,580	38.5	275.58	200.42	75.16
	1283	BAR-10113	82,220	38.5	316.55	230.22	86.33
	1284	CN-76924	74,160	38.5	285.52	207.65	77.87
	1286	CNW-101534	76,560	38.5	294.76	214.37	80.39
	1288	EJE-60163	76,320	38.5	293.83	213.70	80.13
	1285	EJE-7364	70,640	38.5	271.96	197.79	74.17
2/11/31	968	NYC-259611	87,500	38.5	336.88	245.00	91.88
	1022	EJE-7311	72,700	38.5	279.90	203.56	76.34
	1023	NP-29932	76,000	38.5	292.60	212.80	79.80
	1024	GN-13947	74,300	38.5	286.06	208.04	78.02
	967	PLE-33153	81,580	38.5	314.08	228.42	85.66
	964	MC-63460	83,840	38.5	322.78	234.76	88.03
	965	EJE-7774	80,040	38.5	308.15	224.11	84.04
	966	7376	82,080	38.5	316.01	229.82	86.19
	963	NYC-259479	84,320	38.5	324.63	236.10	88.53
	969	52199	116,000	38.5	446.60	324.80	121.80
2/10	845	EJE-7350	82,240	38.5	316.62	230.27	86.35
			7,589,672		$29,220.81	$21,252.37	$7,968.44

[fol. 6] Stipulation to extend time of defendant to file answer dated March 19, 1934.

Order extending time of defendant to file answer 30 days entered March 19, 1934.

Stipulation to extend time of defendant to file answer dated April 18, 1934.

Order extending time of defendant to file answer 30 days entered April 18, 1934.

Stipulation to extend time of defendant to file answer dated May 18, 1934.

Order extending time of defendant to file answer 30 days entered May 18, 1934.

Stipulation to extend time of defendant to file answer dated June 15, 1934.

Order extending time of defendant to file answer 30 days entered June 15, 1934.

Stipulation to extend time of defendant to file answer dated July 13, 1934.

Order extending time of defendant to file answer 60 days entered July 13, 1934.

Stipulation to extend time of defendant to file answer dated September 10, 1934.

Order extending time of defendant to file answer 60 days entered September 11, 1934.

Stipulation to extend time of defendant to file answer dated November 7, 1934.

Order extending time of defendant to file answer 60 days entered November 8, 1934.

[fol. 7] Stipulation to extend time of defendant to file answer dated January 4, 1935.

Order extending time of defendant to file answer 60 days entered January 4, 1935.

Stipulation to extend time of defendant to file answer dated March 4, 1935.

Order extending time of defendant to file answer 60 days entered March 4, 1935.

Stipulation to extend time of defendant to file answer dated May 1, 1935.

Order extending time of defendant to file answer 60 days entered May 2, 1935.

Stipulation to extend time of defendant to file answer dated June 26, 1935.

Order extending time of defendant to file answer 60 days dated June 28, 1935.

Answer of the defendant to the Amended Complaint of the Plaintiff herein, filed September 24, 1935 (omitting caption), as follows:

ANSWER TO AMENDED COMPLAINT

Illinois Steel Company, defendant, by Knapp, Beye, Allen, Cochran and Cushing, its attorneys, answering the amended complaint of the plaintiff in this action, says:

1. Defendant admits that plaintiff is a common carrier by railroad operating a line of railroad through various states of the United States, and in particular from Chicago, Illinois, eastward to Baltimore, Maryland.

[fol. 8] 2. Defendant admits that plaintiff, as such common carrier, has published and filed with the Interstate Commerce Commission its classifications, rates and tariffs for the transportation of goods over its line of railroad.

3. Defendant admits that it is a corporation and that it has a steel mill located at Gary, Indiana, from which point it makes large shipments of ammonia sulphate.

4. Defendant admits that on various dates between August 9, 1929 and February 18, 1931, it made large shipments of ammonia sulphate from Gary, Indiana, to Baltimore, Maryland.

5. Defendant admits that the various dates on which shipments were made, appear on the statement attached to the amended complaint, and that said statement is marked Exhibit "A", and made a part of said amended complaint.

6. Defendant admits that said shipments were loaded in cars at the plant of the defendant at Gary, Indiana, and delivered to Elgin, Joliet and Eastern Railway Company. Defendant admits that Elgin, Joliet and Eastern Railway Company delivered said cars so loaded to the plaintiff herein to complete the transportation thereof to Baltimore, Maryland.

7. Defendant admits that it prepaid to the Elgin, Joilet and Eastern Railway Company the sum of $21,252.37. Defendant denies that the amount so paid was only a portion of the lawful charges for transporting said shipments from Gary, Indiana, to Baltimore, Maryland. Defendant denies

that it has refused and still refuses to pay the full lawful [fol. 9] charges on said shipments. Defendant denies that the full lawful charges on said shipments amount to $29,220.81. Defendant admits that said Exhibit "A" shows the date of each shipment, the waybill number, initial of car and number, and the weight of the shipment. Defendant denies that said Exhibit "A" shows the proper lawful rate on said shipments or the proper lawful charges. Defendant admits that it paid the amounts shown on said Exhibit "A". Defendant denies that there is any balance due from defendant on any shipment shown on said Exhibit "A". Defendant denies that there is due the plaintiff from the defendant the sum of $7,968.44, or any amount whatsoever.

8. Defendant alleges that the defendant and said Elgin, Joilet and Eastern Railway Company entered into a written contract or bill of lading to provide for the transportation of each of the shipments specified in said Exhibit "A" attached to the amended complaint. Defendant further alleges that under the terms of each of said contracts or bills of lading said Elgin, Joilet and Eastern Railway Company agreed, for the amount specified in said contracts or bills of lading (which amounts are the same as the corresponding amounts under the heading "Amounts Paid by Defendant" in said Exhibit "A"), to be prepaid by the defendant to Elgin, Joilet and Eastern Railway Company at the time of shipment, to transport each of said shipments via the line of railroad of Elgin, Joilet and Eastern Railway Company to Curtis, being a point in the State of Indiana, and there to deliver each of said shipments to the plaintiff for transportation to Curtis Bay, in the City of Baltimore, and State of Maryland, where each of said shipments was to be [fol. 10] delivered to Standard Wholesale Phosphate and Acid Works, Inc.

Defendant further alleges that each of said contracts or bills of lading provided that each of said shipments was for export for loading on vessel sailing from Baltimore, Maryland, on certain dates.

Defendant further alleges that each of said contracts or bills of lading contained the following provisions by the defendant:

"If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

"The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See section 7 of conditions.)

"Illinois Steel Company

"Per .....

(Signature of consignor.)"

Defendant further alleges that Section 7 of the conditions of each contract or bill of lading entered into between defendant and Elgin, Joliet and Eastern Railway Company to provide for the transportation of said shipments which moved during the year 1929 as specified in said Exhibit "A", is as follows:

"Sec. 7. The owner or consignee shall pay the freight and average, if any, any all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, ex- [fol. 11] cept that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor shall not be liable for such charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

Defendant further alleges that Section 7 of the conditions of each contract or bill of lading entered into between defendant and Elgin, Joliet and Eastern Railway Company to provide for the transportation of the remaining shipments, specified in said Exhibit "A", is as follows:

"Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad

shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. *Provided, that*, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against [fol. 12] him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

Defendant further alleges that at the time of making each shipment the said Elgin, Joliet and Eastern Railway Company demanded freight thereon in the amounts set forth under the heading "Amounts Paid by Defendant" in said Exhibit "A", and that the defendant prepaid said amounts

to said Elgin, Joliet and Eastern Railway Company as required by said contracts or bills of lading and that said Elgin, Joliet and Eastern Railway Company transported each of said shipments to Curtis, a point in the State of Indiana, and there delivered each of said shipments to the plaintiff, and the plaintiff received, transported and delivered each of said shipments to Standard Wholesale Phosphate and Acid Works, Inc. at Curtis Bay, in the City of [fol. 13] Baltimore, in the State of Maryland.

Defendant alleges that it has paid all of the lawful charges on said shipments due from defendant to plaintiff, and that under the provisions of each of said contracts or bills of lading it is not liable to the plaintiff for any further charges on any of said shipments.

Defendant further alleges that if plaintiff made delivery of said shipments, or any of them, without collection from the consignee, Standard Wholesale Phosphate and Acid Works, Inc., of any additional charges due or deemed by the plaintiff to be due on said shipments, or any of them, the said plaintiff waived and lost its right to collect any additional charges from the defendant.

9. Defendant alleges that said shipments, and each of them, moved in interstate commerce, and that all of the charges collected or to be collected thereon by the plaintiff were and are subject to the provisions of the Interstate Commerce Act; that at all of the times herein mentioned Section 16 (3) (a) provided as follows:

"All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after."

And Section 16 (3) (c) provided:

"The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after."

[fol. 14] Defendant alleges that all of the shipments delivered to said Elgin, Joliet and Eastern Railway Company by the defendant for transportation during the year 1929 and shown on Exhibit "A", attached to the amended complaint, were delivered by the plaintiff at the destination

specified in said bills of lading more than three years prior to the filing of the amended complaint herein.

Wherefore, the defendant asks that plaintiff's action against defendant be dismissed at plaintiff's cost.

Knapp, Beye, Allen, Cochran & Cushing, 208 South LaSalle Street, Chicago, Illinois, Attorneys for Defendant.

July 19, 1937, notice placing case on trial calendar filed.
April 22, 1941, notice resetting case for trial.

Stipulation of Facts filed April 22, 1941 (omitting caption), follows:

STIPULATION OF FACTS

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that upon the trial of the above entitled cause the following shall be taken as a true statement of the facts, with the same force and effect as if such facts were presented in open court by competent evidence, subject only to the right of either party to object to the immateriality or irrelevancy of any or all of such facts:

[fol. 15] That the plaintiff is a common carrier by railroad operating a line of railroad through various states of the United States, and in particular, from Chicago, Illinois, eastward to Baltimore, Maryland.

That plaintiff, as such common carrier, has published and filed with the Interstate Commerce Commission its classifications, rates and tariffs for the transportation of goods over its line of railroad.

That defendant is a corporation and at all times herein referred to it had a steel mill located at Gary, Indiana, from which point it made large shipments of ammonia sulphate.

That defendant on various dates between August 9, 1929, and February 18, 1931, made large shipments of ammonia sulphate from Gary, Indiana, to Baltimore, Maryland; that the various dates on which the said shipments were made appear on the statement attached to the amended complaint and that said statement is marked Exhibit "A" and made a part of said amended complaint.

That said shipments were loaded in cars at the plant of the defendant at Gary, Indiana, and delivered to Elgin, Joliet and Eastern Railway Company. That Elgin, Joliet

and Eastern Railway Company delivered said cars so loaded to the plaintiff herein to complete the transportation thereof to Baltimore, Maryland.

That the consignee of the shipments, the Standard Wholesale Phosphate & Acids Works, Inc., deals in sulphate of ammonia; that the consignee is not owned or controlled by the defendant (consignor) and that the consignor and con- [fol. 16] signee are entirely separate and distinct corporations; that consignee's plant is located on the waterfront in the Curtis Bay District of Baltimore, Maryland, and includes two buildings built partly into or over the water of Curtis Bay, alongside of which buildings the cars containing the shipments in question were placed on tracks by the plaintiff; that these two buildings are used for storing, mixing and bagging commodities moving in both domestic and export commerce, and branch on to or abut wharves at which steamers are berthed for receiving and discharging cargoes; that the said shipments of sulphate of ammonia arrived in bulk and were unloaded from said cars through doors in the sides of said buildings and dumped into bins; that the said shipments of sulphate of ammonia were later placed in bags and handled through the doors in the ends of the building across short uncovered wharves or aprons and loaded into steamers alongside such wharves and exported.

That the so-called domestic rate on sulphate of ammonia from Gary, Indiana to Baltimore, Md., was published in Jones' Tariff No. I. C. C. 2123 and was 38.5¢ per 100 pounds; that the so-called export rate on sulphate of ammonia from Gary, Indiana, to Baltimore, Md., was published in Agent Jones, Tariff No. I. C. C. 2123 at 28¢ per 100 pounds and said tariff carried the following rule as Item Number 9322:

"The rates named in this tariff, or as same may be amended and designated as 'export rates' will apply only on traffic delivered by the Atlantic Port Terminal carriers to the steamer or steamer's dock upon arrival at the port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of the export rates and also on traffic delivered to [fol. 17] the party entitled to receive it at the carrier's seaboard stations to which export rates apply which traffic is handled direct from the carrier's stations to steamship

docks and on which required proof of exportation is given (CFA Inf. 8179)."

That the defendant and said Elgin, Joliet and Eastern Railway Company, at the time of making each shipment, entered into a written contract or bill of lading to provide for the transportation of each of the shipments specified in said Exhibit "A", attached to the amended complaint. That each of said contracts or bills of lading provided that each of said shipments was for export, sometimes indicating that the shipment was for loading on vessel sailing from Baltimore, Maryland, on certain specified dates; that each of said contracts or bills of lading, among other things, specified the following:

"Consigned to Standard Wholesale Phosphate & Acid Works, Inc.
Destination—Curtis Bay—Baltimore, State of Maryland.
Route—EJ&E, Curtis, B&O—for export—
Freight rate—Prepaid 28¢ per 100# to Baltimore.
Switching rate—none.
J. L.—destination N. A. 5 for export to Porto Rico. Must go through to coast without transfer on account of liability of damage to contents consisting of sulphate of ammonia for fertilizer purposes."

That each of the Bills of Lading covering the shipments contained the following provision, signed by the defendant by one of its authorized employees:

"If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
[fol. 18] "The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Section 7 of conditions.)
Illinois Steel Company, Per —— —— (Signature of consignor)."

That each of said Bills of Lading contains the following:

"If charges are to be prepaid, write or stamp here 'To be Prepaid.'"

The words "To Be Prepaid" were inserted by the defendant in the space provided at the time of the making of each such Bill of Lading.

That each of said Bills of Lading contains the following:

"Received $ ..... to apply in prepayment of the charges on the property described hereon.

..... Agent of Cashier

Per .....

(The signature here acknowledged only the amount prepaid.)"

That Section 7 of the conditions of each of said Bills of Lading was as follows:

"Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates [fol. 19] and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him. If the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or in the case of a shipment so reconsigned or

diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to whom the beneficial owner is, such consignee shall himself be liable for such additional charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

It is further stipulated and agreed that at the time of making each shipment the said Elgin, Joliet and Eastern Railway Company demanded freight thereon in the amount [fol. 20] set forth under the heading "Amounts Paid By Defendant" in Exhibit "A" of the Amended Complaint herein, and that the defendant prepaid said amounts to said Elgin, Joliet and Eastern Railway as required by said contracts or bills of lading and that said Elgin, Joliet and Eastern Railway Company transported each of said shipments to Curtis, a point in the State of Indiana, and there delivered each of said shipments to the plaintiff, and that the plaintiff received, transported and delivered each of said shipments to Standard Wholesale Phosphate & Acid Works, Inc., at Curtis Bay, in the City of Baltimore in the State of Maryland; and that the plaintiff made delivery of said shipments without collection from the consignee, Standard Wholesale Phosphate & Acid Works, Inc., of any additional charges due or deemed by the plaintiff to be due on said shipments, or any of them.

That said shipments and each of them moved in interstate commerce and that all the charges collected or to be collected thereon by the plaintiff were and are subject to the provisions of the Interstate Commerce Act; that at all of the times herein mentioned Section 16 (3) (a) provided as follows:

"All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after."

And Section 16 (3) (c) provided:

"The cause of action in respect of a shipment of property shall, for the purpose of this section, be deemed to

accrue upon delivery or tender of delivery thereof by the carrier, and not after."

That all of the shipments delivered to said Elgin, Joliet and Eastern Railway Company by the defendant for transportation prior to February 5, 1931, and shown on Exhibit [fol. 21] "A", attached to the amended complaint, were delivered by the plaintiff at the destination specified in said bills of lading more than three years prior to the filing of the original complaint herein.

That the plaintiff is not entitled to recover the balance of the charges alleged to be due on shipments that were delivered more than three years prior to the institution of this suit.

That the total freight charges at the export rate on the shipments delivered within 3 years prior to the institution of this suit was $9.801.93, which charges the defendant prepaid on said shipments. That the total freight charges on said shipments at the domestic rate was $13,477.45, a difference of $3,675.52.

That if the court shall find that Section 7 of the conditions of the Bills of Lading is not a bar to recovery by plaintiff from the defendant, then plaintiff is entitled to recover the sum of $3,675.52, being the amount due on the shipments delivered to the consignee within three (3) years prior to the institution of this suit; if the court shall find that Section 7 of the conditions of the Bills of Lading is a bar to recovery by the plaintiff from the defendant, then plaintiff is not entitled to recover.

H. D. Sheean & E. W. Lademann, Plaintiff's Attorneys. Knapp, Allen & Cushing, Defendant's Attorneys.

April 22, 1941, Order submitting cause to court on Stipulation of facts and rule on plaintiffs to file brief with the [fol. 22] court in support of its case within 20 days, and that defendant file its brief with the court within 30 days thereafter, and plaintiff file a reply brief with the court within 10 days after defendant filed its brief and cause set for trial before the court on June 24, 1941.

June 24, 1941, Order extending defendant's time to file brief with the court to September 7, 1941, and the plaintiff's reply brief to be filed within 20 days after the brief of de-

fendant is filed and cause set for hearing on September 29, 1941.

September 24, 1941, Order postponing hearing to October 6, 1941.

October 10, 1941, Judgment Order (omitting caption) as follows:

JUDGMENT ORDER

This cause coming on to be heard, and counsel for both parties being present, and said cause having been submitted to the Court upon the written stipulation of facts filed herein, whereby it is agreed that the sole issue to be decided by the Court is: Does the executed "no recourse" clause and Section 7 of the conditions of the uniform interstate bill of lading exempt the consignor (defendant herein), under the facts and circumstances in this case, from liability to the carrier (plaintiff herein) for additional freight charges on the shipments mentioned in the complaint filed herein, where the carrier made delivery of the property shipped to the consignee named in said bills of lading without the collection from the consignee of any additional charges thereafter claimed to be due?

Upon consideration of the pleadings, the written stipulation of facts, briefs and oral argument of counsel for [fol. 23] both parties, and being fully advised in the premises:

The Court hereby finds that the issue submitted by the parties should be decided in the affirmative; that the plaintiff (carrier) delivered each of the shipments to the consignee, Standard Wholesale Phosphate & Acid Works, Inc.; that the defendant (consignor), as to each of the shipments involved prepaid the freight charges at the export rate and signed the "no recourse" clause of the uniform interstate bill of lading; that the provisions of the "no recourse" clause signed by the defendant and Section 7 of the conditions of the said uniform interstate bill of lading contracts constitute a bar to the recovery by the plaintiff from the defendant of any additional charges on said shipments; and that judgment should be entered for the defendant herein.

It Is Therefore Ordered, Adjudged and Decreed that judgment be and it is hereby entered for the defendant, that the plaintiff take nothing by its suit, that the defendant, Illinois Steel Company, go hence without day, and that the

said defendant do have and recover of and from the plaintiff its costs and charges in this behalf expended and have execution therefor.

Enter.

(Signed) Francis B. Allegretti, Judge.

Dated: October —, 1941.

O. K.

E. W. Lademann, Attorney for Plaintiff.

O. K.

Knapp, Allen & Cushing, Attorneys for Defendant.

[fol. 24] NOTICE OF APPEAL

October 30, 1941, Notice of appeal filed by The Baltimore and Ohio Railroad Company, defendant (Appellant) to Appellate Court, First District of Illinois, from the final judgment of Superior Court of Cook County, Illinois, entered in said cause on October 10, 1941, finding the issues in favor of the defendant and against the plaintiff, whereupon it was ordered that defendant do have and recover of the plaintiff its cost of suit. Plaintiff (Appellant) prays that said judgment may be reversed.

October 30, 1941, Notice to attorneys for defendant of filing of aforesaid notice of appeal in office of said Clerk, with receipt thereon, dated October 30, 1941, for copy thereof, signed by said attorneys for defendant, filed.

November 7, 1941, proof of service of copy of praecipe for trial court record, with receipt thereon of attorneys for defendant-appellee, dated November 7, 1941, for copy of said notice and of said praecipe for trial court record, filed.

November 7, 1941, praecipe for trial court record filed by plaintiff-appellant.

November 2, 1941, Report of Proceedings at the trial presented to Court, certified as correct and ordered filed.

Certificate of Clerk dated December 2, 1941.

Fees for transcript, $8.00, paid by E. W. Lademann, Attorney for Appellant.

H. D. Sheean and E. W. Lademann, Attorneys for Appellant.

[fol. 25] RECORD FROM APPELLATE COURT, FIRST DISTRICT, TO SUPREME COURT

Nisi Prius Gen. No. 34 S 1752. Appellate Gen. No. 42145. Supreme Court Gen. No. —

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant,

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

[fol. 26] At a Term of the Appellate Court, Begun and held at Chicago, on Tuesday, the First day of December in the year of our Lord One Thousand Nine Hundred and Forty-two within and for the First District of the State of Illinois.

Present Hon. Joseph Burke, Presiding Justice; Present Hon. Oscar Hebel, Justice; Present Hon. Roger J. Kiley, Justice; Sheldon W. Govier, Clerk; Peter B. Carey, Sheriff.

Court met pursuant to law.

Court opened by proclamation.

No. 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant,

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

Be It Remembered, That heretofore on the Second day of December A. D. 1941, it being one of the days of said December Term, A. D. 1941, certain proceedings were had in said Court and entered of record in words and figures following, to-wit:

[fol. 27] At a Term of the Appellate Court, Begun and held at Chicago, on Tuesday, the Second day of December in the year of our Lord One Thousand Nine Hundred and

Forty-one within and for the First District of the State of Illinois.

Present Hon. William H. McSurely, Presiding Justice; Present Hon. David F. Matchett, Justice; Present Hon. John M. O'Connor, Justice; Sheldon W. Govier, Clerk; Thomas J. O'Brien, Sheriff.

Court met pursuant to law.

Court opened by proclamation.

And afterwards, on the 12th day of January A. D. 1942, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 28] 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant,

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

This day came appellant by its counsel and moved the Court to extend the time to and including February 14th A. D. 1942 in which to file its briefs in said cause, as per affidavit and stipulation filed herein, and the Court being fully advised in the premises doth order that said time be and the same is hereby so extended.

And afterwards, on the 16th day of January A. D. 1942, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 29] In the Matter of the Assignment of Cases to the Third Division, Appellate Court, First District, Illinois

February Term, A. D. 1942. Calendar

On the Court's own motion it is ordered that the following-numbered cases on the February Term Calendar, A. D. 1942 of said Court be and the same are hereby assigned to the Third Division Appellate Court for hearing and determination, to-wit: 42145. The Baltimore and Ohio Railroad Company, a Corp. vs. Illinois Steel Company, a Corp.

And afterwards, on the 4th day of March, A. D. 1942, it being one of the days of the February Term, A. D. 1942 of said Court, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 30] 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant,

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

This day came appellee by its counsel and moved the Court to extend the time 30 days from March 16th A. D. 1942 in which to file its briefs in said cause as per affidavit and stipulation filed herein and the Court being fully advised in the premises doth order that said time be and the same is hereby so extended.

And afterwards, on the same day to-wit: the 4th day of March A. D. 1942, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 31] 42145

THE BALTIMORE & OHIO RAILROAD CO., a Corp., Appellant,

vs.

ILLINOIS STEEL CO., a Corp., Appellee

Appeal from Cook Superior

This cause having this day been reached in the call of the docket, and counsel desiring to argue the same, and the Court, not being fully advised in the premises, doth order that said cause be taken under advisement on abstracts and briefs filed by appellant and briefs of appellee due April 15, 1942.

And afterwards, on the 3rd day of July A. D. 1942 it being one of the days of the June Term A. D. 1942 there was filed in the office of the Clerk of said Appellate Court the

written opinion of this Court, which opinion is in the words and figures following, to-wit:

[fol. 32] APPEAL FROM SUPERIOR COURT, COOK COUNTY

42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant

v.

ILLINOIS STEEL COMPANY, A CORPORATION, Appellee

MR. PRESIDING JUSTICE BURKE delivered the opinion of the Court:

In an amended complaint filed in the Superior Court of Cook County on February 28, 1934, plaintiff sought to recover of the defendant a balance of freight charges claimed to be due on a number of shipments of Sulphate of Ammonia, made by defendant as consignor, from its plant at Gary, Indiana to Wholesale Phosphate and Acid Works, Inc., Baltimore, Maryland, as consignee, for export. Plaintiff attached a statement marked "Exhibit A", giving complete data as to each shipment, including the lawful charge, the amount paid by defendant and the balance claimed to be due. Defendant prepaid the freight charges at the export rate and the additional charges are alleged to be due because the export rate was not applicable to the shipments, but that the domestic rate, which is higher than the export rate, was the one applicable under the tariffs of the carriers involved. The case was tried before the court upon a stipulation of facts. The court found the issues in favor of the defendant and entered judgment for costs against the plaintiff. This appeal followed.

The parties stipulated that the plaintiff is a common carrier by railroad operating a line of railroad through various states of the United States, and in particular, from Chicago, Illinois, eastward to Baltimore, Maryland; that the plaintiff, as such common carrier, has published and filed with the Interstate Commerce Commission its classifications, rates and tariffs for the transportation of goods over its line of railroad; that defendant is a corporation and at all [fol. 33] times herein referred to it had a steel mill located at Gary, Indiana, from which point it made large shipments

of ammonia sulphate; that defendant on various dates between August 9, 1929, and February 18, 1931, made large shipments of ammonia sulphate from Gary, Indiana, to Baltimore, Maryland; that the various dates on which the said shipments were made appear on the statement attached to the amended complaint and that said statement is marked Exhibit "A" and made a part of said amended complaint; that said shipments were loaded in cars at the plant of the defendant at Gary, Indiana, and delivered to Elgin, Joliet and Eastern Railway Company; that Elgin, Joliet and Eastern Railway Company delivered said cars so loaded to the plaintiff herein to complete the transportation thereof to Baltimore, Maryland; that the consignee of the shipments, the Standard Wholesale Phosphate & Acid Works, Inc., deals in sulphate of ammonia; that the consignee is not owned or controlled by the defendant (consignor) and that the consignor and consignee are entirely separate and distinct corporations; that consignee's plant is located on the waterfront in the Curtis Bay District of Balimore, Maryland, and includes two buildings built partly into or over the water of Curtis Bay, alongside of which buildings the cars containing the shipments in question were placed on tracks by the plaintiff; that these two buildings are used for storing, mixing and bagging commodities moving in both domestic and export commerce, and branch on to or abut wharves at which steamers are berthed for receiving and discharging cargoes; that the said shipments of sulphate of ammonia arrived in bulk and were unloaded from said cars through doors in the sides of said buildings and dumped into bins; that the said shipments of sulphate of ammonia were later placed in bags and handled through the doors in the ends of the building across short uncovered wharves or aprons and loaded into steamers alongside such wharves and exported; that the so-called domestic rate on sulphate of ammonia from Gary, Indiana to Baltimore, Md., [fol. 34] was published in Jones' Tariff No. I. C. C. 2123 and was 38.5¢ per 100 pounds; that the so-called export rate on sulphate of ammonia from Gary, Indiana, to Baltimore, Md., was published in Agent Jones, Tariff No. I. C. C. 2123 at 28¢ per 100 pounds and said tariff carried the following rule as Item Number 9322:

"The rates named in this tariff, or as same may be amended and designated as 'export rates' will apply only

on traffic delivered by the Atlantic Port Terminal carriers to the steamer or steamer's dock upon arrival at the port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of the export rates and also on traffic delivered to the party entitled to receive it at the carrier's seaboard stations to which export rates apply which traffic is handled direct from the carrier's stations to steamship docks and on which required proof of exportation is given (CFA Inf. 8179)."

that the defendant and said Elgin, Joliet and Eastern Railway Company, at the time of making each shipment, entered into a written contract or bill of lading to provide for the transportation of each of the shipments specified in said Exhibit "A", attached to the amended complaint; that each of said contracts or bills of lading provided that each of said shipments was for export, sometimes indicating that the shipment was for loading on vessel sailing from Baltimore, Maryland, on certain specified dates; that each of said contracts or bills of lading, among other things, specified the following:

"Consigned to Standard Wholesale Phosphate & Acid Works, Inc.
Destination—Curtis Bay—Baltimore, State of Maryland.
Route—EJ&E, Curtis, B&O—for export.
Freight rate—Prepaid 28¢ per 100# to Baltimore.
Switching rate—none.
J. L.—destination N. A. 5 for export to Porto Rico. Must go through to coast without transfer on account of liability of damage to contents consisting of sulphate of ammonia for fertilizer purposes."

that each of the Bills of Lading covering the shipments contained the following provision, signed by the defendant by one of its authorized employees:

"If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: the carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Section 7 of Conditions.)

[fol. 35] Illinois Steel Company, Per —— ——,
(Signature of consignor)."

that each of said Bills of Lading contains the following: "If charges are to be prepaid, write or stamp here 'To be Prepaid'." The words "To be Prepaid" were inserted by the defendant in the space provided at the time of the making of each such Bill of Lading; that each of said Bills of Lading contains the following:

"Received $—— to apply in prepayment of the charges on the property described hereon. —— —— Agent or Cashier, Per —— —— (The signature here acknowledged only the amount prepaid.)"

that section 7 of the conditions of each of said Bills of Lading was as follows:

"Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him. If the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and,

in such cases the shipper or consignor, or in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

[fol. 36] It is further stipulated and agreed that at the time of making each shipment the said Elgin, Joliet and Eastern Railway Company demanded freight thereon in the amount set forth under the heading "Amounts Paid by Defendant" in Exhibit "A" of the Amended Complaint herein, and that the defendant prepaid said amounts to said Elgin, Joliet and Eastern Railway as required by said contracts or bills of lading and that said Elgin, Joliet and Eastern Railway Company transported each of said shipments to Curtis, a point in the State of Indiana, and there delivered each of said shipments to the plaintiff, and that the plaintiff received, transported and delivered each of said shipments to Standard Wholesale Phosphate & Acid Works, Inc., at Curtis Bay, in the City of Baltimore in the State of Maryland; and that the plaintiff made delivery of said shipments without collection from the consignee, Standard Wholesale Phosphate & Acid Works, Inc., of any additional charges due or deemed by the plaintiff to be due on said shipments, or any of them; that said shipments and each of them moved in interstate commerce and that all the charges collected or to be collected thereon by the plaintiff were and are subject to the provisions of the Interstate Commerce Act; that at all of the times herein mentioned Section 16 (3) (a) provided as follows:

"All actions at law by carrier subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after."

Section 16 (3) (e) provided:

"The cause of action in respect of a shipment of property shall, for the purpose of this section, be deemed to accrue

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upon delivery or tender of delivery thereof by the carrier, and not after."

that all of the shipments delivered to said Elgin, Joliet and Eastern Railway Company by the defendant for transportation prior to February 5, 1931, and shown on Exhibit "A" attached to the amended complaint, were delivered by the plaintiff at the destination specified in said bills of lading more than three years prior to the filing of the original complaint herein; that the plaintiff is not entitled to recover [fol. 37] the balance of the charges alleged to be due on shipments that were delivered more than three years prior to the institution of this suit; that the total freight charges at the export rate on the shipments delivered within 3 years prior to the institution of this suit was $9,801.93, which charges the defendant prepaid on said shipments; that the total freight charges on said shipments at the domestic rate was $13,477.45, a difference of $3,675.52; that if the court shall find that Section 7 of the conditions of the Bills of Lading is not a bar to recovery by plaintiff from the defendant, then plaintiff is entitled to recover the sum of $3,675.52, being the amount due on the shipments delivered to the consignee within three (3) years prior to the institution of this suit; if the court shall find that Section 7 of the conditions of the Bills of Lading is a bar to recovery by the plaintiff from the defendant, then plaintiff is not entitled to recover.

Plaintiff's theory of the case is that Section 7 of the conditions of the bills of lading can have no application to a prepaid shipment, particularly, under the facts and circumstances in this case, where the carriers, upon being advised that said shipments were for export, demanded payment of their charges in advance on the basis of the export rate, and had no notice or knowledge that said shipments, after delivery to consignee, would be so handled as to make inapplicable the export rate, and make applicable the domestic rate; that under section 7 of the conditions of the bills of lading, the carriers have a right to "require at time of shipment the prepayment or guarantee of the charges" and that the defendant could not deprive the carriers of this right of prepayment by the execution of the stipulation under section 7 of the conditions of the bills of lading. Defendant's theory of the case, as stated by plaintiff, is that having executed the stipulations on the bills of lading re-

ferred to in section 7 of the conditions of the bills of lading, and plaintiff having delivered the shipments contrary to such stipulations, has no recourse against the defendant, [fol. 38] but must look to the consignee for any additional charges.

The shipments of Sulphate of Ammonia were delivered by the defendant as shipper and consignor to the Elgin, Joliet & Eastern Railway at Gary, Indiana, consigned to the Standard Wholesale Phosphate and Acid Works, Inc., Baltimore, Maryland, and transported by that railroad and by plaintiff as terminal carrier. The shipments were made under uniform straight bills of lading in the forms prescribed by the Interstate Commerce Commission. At the time the shipments moved, [and also today], there were two rates applicable to the shipments of this product from Gary to Baltimore, dependent upon whether the shipments were for export or domestic use. The rate on a shipment for export was and is lower than the rate on a shipment for domestic use. On each of the bills of lading issued upon the shipments involved here the defendant signified that the shipment was for export, and that the freight charges thereon were to be prepaid. The defendant prepaid to the Elgin, Joliet & Eastern Railway the freight charges on each shipment from Gary to Baltimore at the export rate. The initial carrier demanded the prepayment of the freight charges in the amount set out in Exhibit A, and defendant prepaid the amounts so demanded. The railroad tariff which published the export rate on Sulphate of Ammonia from Gary to Baltimore carried the following limitation upon the application of that rate:

"The rates named in this tariff, or as same may be amended and designated as 'export rates' will apply only on traffic delivered by the Atlantic Port Terminal carriers to the steamer or steamer's dock upon arrival at the port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of the export rates and also on traffic delivered to the party entitled to receive it at the carrier's seaboard stations to which export rates apply, which traffic is handled direct from the carrier's stations to steamship docks and on which required proof of exportation is given."

The shipments in question upon arrival at Baltimore were not delivered either to the "steamer or steamer's dock" or to the "carrier's seaboard stations", but on the contrary were delivered by the plaintiff upon the consignee's instructions at a building used by the consignee for storing, mixing and bagging commodities moving in both domestic and [fol. 39] export commerce. Since this delivery did not meet the tariff requirement for the application of the rate, plaintiff demanded that the defendant pay the domestic rate on the shipments, and upon defendant's refusal to pay, the instant suit was brought for the difference between the total freight charges on the shipments at the domestic rate and the total freight charges prepaid by the defendant on the shipments at the export rate. The defendant pleaded that certain items were barred by the limitation of Section 16 (3) (a) that "All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after". The stipulation disposed of this defense by providing that the total freight charges at the export rate on the shipments delivered within three years prior to the instant suit were $9,801.93, which the defendant prepaid, and that the total freight charges on the shipments at the domestic rate were $13,477.45, a difference of $3,675.52, and that if the court found that Section 7 of the conditions of the bills of lading was not a mar to recovery by plaintiff, then plaintiff was entitled to recover the sum of $3,675.52.

Each of the bills of lading under which these shipments moved contained the following provision: "If charges are to be prepaid, write or stamp here 'To Be Prepaid'." The words "To Be Prepaid" were inserted by the defendant in the space provided at the time of the making of each bill of lading, and the charges on each shipment were prepaid by the defendant to the initial carrier at the export rate. Each of the bills of lading had this further provision which was signed by the defendant:

"If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Section 7 of Conditions.)"

The pertinent portion of Section 7 of the conditions of the bills of lading is as follows:

[fol. 40] "Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates by signature, in the space provided for that purpose on the face of this bill of lading, that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. * * * Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

The question we are asked to determine is whether the provisions of Section 7 release the defendant from liability for the additional freight charges due on the shipments in the face of defendant's specifications as to each shipment that the freight charges thereon were to be prepaid by the defendant. It will be noted that the shipments actually were exported by the consignee. Plaintiff contends that the method of handling the shipments at destination by the consignee made the export rate inapplicable and resulted in the additional charges. By their stipulation, the parties have eliminated any controversy about the claim of the railroad for the additional charges, apparently recognizing that the shipments were not handled at the point of delivery in Baltimore in such a manner as to entitle them to the export rate. Defendant contends that because of the nonrecourse clause in the bill of lading plaintiff cannot prevail in its attempt to collect the undercharge from it.

Plaintiff contends that the trial court erred in finding the issues for defendant. Defendant asserts that plaintiff

failed to perform its contract by delivering the property without collection of the freight and all other lawful charges, and is not entitled to recovery; that it (defendant) has complied fully with the contract of transportation; and that plaintiff cannot recover in the absence of a showing that defendant has been guilty of a breach of the contract. The [fol. 41] parties are in agreement that the bills of lading including the "no recourse" clause and Section 7 of the conditions of the bills of lading, were valid, lawful, binding and enforceable contracts. Defendant points out that the shipments were transported under uniform straight bills of lading in the form prescribed by the Interstate Commerce Commission. Defendant also urges that there is no inconsistency resulting from the prepayment by the consignor of a portion or all of the charges at the export rate as shown on the face of the uniform bills of lading and the execution by the consignor of the "prepay" and of the "no recourse" clauses of the bills of lading, that the consignor may prepay all or any part of the charges and that the protection of the "no recourse" clause is not limited to "collect" shipments. Finally, defendant insists that the very purpose of the executed "no recourse" clause is to protect the consignor from liability for freight and other charges, including subsequently discovered undercharges, in the event that the carrier, contrary to the provisions of the clause, parts with possession of the property without collecting all charges due the carrier; that if the carrier wishes to hold the consignor liable for the charges, such carrier must retain possession of the property until all the charges due thereon have been paid; and that if the carrier makes delivery of the property without collecting all charges, such carrier can no longer hold the consignor liable, but thereafter must look solely to the consignee for payment of any unpaid charges. The courts have uniformly held that it is the duty of the carrier to collect its lawful charges. In *Davis* v. *Keystone Steel & Wire Co.*, 317 Ill. 278, the court said (288):

"The terms of every contract of shipment, so far as the service to be rendered and the compensation to be received are concerned, are fixed by the schedule filed with and approved by the Interstate Commerce Commission. No agreement of the parties can modify those terms, though expressed in writing and actually performed. The collection by the carrier of less than the schedule rate, though ex-

pressly agreed on, will not prevent the recovery of the shortage from the schedule rate. The rates defined by the tariff cannot be varied or enlarged by either contract or tort by the carrier."

[fol. 42] There is no contention that the defendant committed any fraud. Defendant believed in good faith that the shipments would be exported and the bills of lading bore a notation that they were for export. Plaintiff accepted the charges paid to the initial carrier in accordance with the directions on the bills of lading, and it had no knowledge until the shipments had been delivered to the consignee at Baltimore, that the provisions of the export tariff would not be complied with and that the domestic rate would be the only rate legally applicable to the shipments. In *The Alton Railroad Company* v. *Gillards*, 379 Ill. 308, the court said (313):

"It has been repeatedly held that while the rights and liabilities of shippers as to the rates and amounts of the charges made are governed by the Federal laws relating to interstate commerce, as interpreted by the Federal courts, still the Interstate Commerce act does not purport to determine upon whom the liability to pay transportation charges shall fall. This is a matter of contract in no way controlled by the Interstate Commerce act. • • • The Interstate Commerce act is not concerned with who shall pay the transportation charges. It permits the carrier to make any contract it may see fit with reference to who shall pay the charges. Its only purpose is to prevent discrimination and rebates. It prohibits the application of any act or conduct as estopping a carrier from exacting the lawful freight rate."

Defendant invokes the nonrecourse provision of Section 7 of the conditions of the bills of lading. Plaintiff's position is that Section 7 is limited to "collect" shipments and does not relate to "prepaid" shipments, where the consignor has expressly undertaken to prepay the freight. Defendant contends that there is no inconsistency resulting from the prepayment by the consignor of a portion or all of the charges at the export rate as shown on the face of the bills of lading and the execution by the consignor of the "prepay" and of the "no recourse" clauses, and that the protection of the

"no recourse" clause is not limited to "collect" shipments. Defendant points out that it is a general principle of construction that, if possible, an instrument should be construed as to give effect to all of its provisions, and that in this case it is possible to give effect to both the "prepay" and the "no recourse" clauses because the shipper, in [fol. 43] effect, stated that it had a shipment to Puerto Rico, and wished to prepay the charges to Baltimore; that it asked the carrier how much the charges would be; that on being informed the charges would be 28¢ per 100 pounds to Baltimore the shipper agreed to prepay the amount thus demanded; that to protect itself fro liability for any additional charges which might accrue over and above those which the defendant by its sales contract with the consignee and by its transportation contract with the initial carrier had agreed to pay, the consignor in executing the bill of lading also signed the "no recourse" clause, which meant the carrier could not have recourse upon the consignor if it delivered the property without collecting all of the charges lawfully due.

We have studied the cases cited by the respective parties. These cases are helpful to an understanding of the problem presented, but none passes on the proposition. It will be observed that Section 7 of the conditions of the bills of lading provides that "nothing herein shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped." The first part of this section makes the consignor primarily liable for the freight and all other lawful charges. It then provides that if the consignor signs the stipulation and the carrier makes delivery without requiring the payment of such charges, the consignor shall not be liable for such charges. It is clear that the words "such charges" mean the freight and all other lawful charges. We agree with plaintiff that "such charges" having been prepaid, the "no recourse" clause does not apply. This is particularly true when we consider the last two sentences of the section which provide that "nothing herein shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges" and that "if upon inspection it is [fol. 44] ascertained that the articles shipped are not those

described in this bill of lading, the freight charges must be paid upon the articles actually shipped." The bills of lading required that if the charges were to be prepaid, the words "To be Prepaid" were to be written or stamped thereon. The words "To be Prepaid" were inserted by the defendant at the time of the making of each bill of lading. The initial carrier required the defendant to prepay the charges. In our opinion the charges which the defendant agreed to prepay were whatever charges were applicable to the commodity. We are also of the opinion that the "no recourse" clause is not applicable to the situation covered by the stipulation. Furthermore, the initial carrier required defendant to prepay the charges, as it had a right to do. Referring to the clause that "if upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped", plaintiff contends that defendant described the goods as being for export, when in fact they were domestic goods under the carrier's tariff, and that the change in character did not reveal itself until the goods had been delivered to the consignee and could not possibly have been known to plaintiff until the delivery had been made. We agree that this is not a case of mis-description. While it is true that the commodity shipped was described as Sulphate of Ammonia and that Sulphate of Ammonia was shipped, the export rate was applied on the assumption that the handling of each shipment would be in accordance with the tariff regulation. Plaintiff had no control over the handling of each shipment after it was delivered to the consignee at Baltimore. Defendant, in selling its product, had the opportunity to contract with the purchaser so as to protect itself by requiring that each shipment be handled so that the export rate would be applicable. Defendant states that it prepaid the charges on the shipment at the export rate and that it had no way of knowing what might happen to the shipment after delivery at Baltimore. Plaintiff points out that if the defendant [fol. 45] did not know what the consignee might do with the shipment, how was it (plaintiff) to know? The shipping instructions from the defendant directed that delivery be made to the Wholesale Phosphate and Acid Works, Inc., Curtis Bay, Baltimore, Maryland, for export. These instructions were carried out and delivery made as directed. There were no additional charges due up to the time of de-

livery. We agree with plaintiff that it would be unreasonable to expect that plaintiff should have anticipated that the consignee might not comply with the export tariff and should have withheld delivery, although the freight charges had been paid. Plaintiff required the payment of its charges at the time of shipment. At that time the defendant designated the shipment as for export. A subsequent examination revealed that the export rate was not applicable. We are of the opinion that the nonrecourse clause of the conditions of the bills of lading was not applicable to the shipments under discussion, and that plaintiff is entitled to recover the difference between the domestic rate and the export rate on the shipments delivered within three years prior to the institution of the suit, or $3,675.52. Therefore, the judgment of the Superior Court of Cook County is reversed and the cause remanded with directions to enter a judgment for the plaintiff and against defendant in the sum of $3,675.52 and costs.

Reversed and Remanded With Directions.

Hebel and Killey, JJ. Concur.

[fol. 46] And afterwards, on the same day to-wit: the 3rd day of July A. D. 1942, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 47] No. 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant,

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

On this day came again the said parties, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned, for error, and being now sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the Judgment aforesaid, there is manifest

error: Therefore, it is considered by the Court that for that error, and others in the record and proceedings aforesaid, the Judgment of the Superior Court of Cook County in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the Superior Court of Cook County with directions to said Superior Court to enter a judgment for the plaintiff and against defendant in the sum of $3,675.52 and costs. And it is further considered by the Court that the said Appellant recover of and from the said Appellee its costs, by it in this behalf expended to be taxed, and that it have execution therefor.

[fol. 48] And afterwards, on the 18th day of September A. D. 1942, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 49] 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant,

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

The Court having considered the petition of Appellee praying for a rehearing in said cause, and being now fully advised in the premises, doth order that the prayer of said petition be and the same is hereby allowed.

It is further ordered by the Court that the order and Judgment heretofore entered herein in said cause on the 3rd day of July A. D. 1942, be and the same is hereby vacated and set aside.

And afterwards, on the 25th day of November A. D. 1942, it being one of the days of the October Term A. D. 1942, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 50] 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant,

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

This day came Appellee by its counsel and moved the Court for leave to file a certified copy of the opinion in the case of Chicago Great Western Railway Company vs. Harry A. Hopkins, et al., by the United States District Court for the District of Minnesota, Fourth Division, No. 497 Civil, rendered November 10, 1942, instanter and that same be considered with the petition for rehearing heretofore filed herein in said cause by the Appellee as per reasons and affidavit filed herein, and the Court being fully advised in the premises doth order that said motion be and the same is hereby allowed.

And afterwards, on the 2nd day of December A. D. 1942, it being one of the days of the December Term A. D. 1942, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 51] 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant,

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

This day came Appellant by its counsel and moved the Court for leave to file instanter suggestions in connection with the opinion of the United States District Court of the Northern District of Minnesota, in the case of Chicago Great Western Railway Company vs. Hopkins, heretofore filed herein in said cause by Appellee, as per suggestions and affidavit filed herein, and the Court being fully ad-

vised in the premises doth order that said motion be and the same is hereby allowed.

And afterwards, on the 9th day of December A. D. 1942, there was filed in the office of the Clerk of said Appellate Court the written opinion of this Court, which opinion is in the words and figures following, to-wit:

[fol. 52] 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation, Appellant

v.

ILLINOIS STEEL COMPANY, a corporation, Appellee

Appeal from Superior Court Cook County

On rehearing

Mr. Presiding Justice Burke delivered the opinion of the court.

In an amended complaint filed in the Superior Court of Cook County on February 28, 1934, plaintiff sought to recover of the defendant a balance of freight charges claimed to be due on a number of shipments of Sulphate of Ammonia, made by defendant as consignor from its plant at Gary, Indiana to Wholesale Phosphate and Acid Works, Inc., Baltimore, Maryland, as consignee, for export. Plaintiff attached a statement marked Exhibit "A", giving complete data as to each shipment, including the lawful charge, the amount paid by defendant and the balance claimed to be due. Defendant prepaid the freight charges at the export rate and the additional charges are alleged to be due because the export rate was not applicable to the shipments, but that the domestic rate, which is higher than the export rate, was the one applicable under the tariffs of the carriers involved. The case was tried before the court upon a stipulation of facts. The court found the issues in favor of the defendant and entered judgment for costs against the plaintiff. This appeal followed.

The parties stipulated that the plaintiff is a common carrier by railroad operating a line of railroads through var-

ious states of the United States, and in particular, from Chicago, Illinois eastward to Baltimore, Maryland; that the plaintiff, as such common carrier, has published and [fol. 53] filed with the Interstate Commerce Commission its classifications, rates and tariffs for the transportation of goods over its line of railroad; that defendant is a corporation and at all times herein referred to it had a steel mill located at Gary, Indiana, from which point it made large shipments of ammonia sulphate; that defendant on various dates between August 9, 1929 and February 18, 1931 made large shipments of ammonia sulphate from Gary, Indiana to Baltimore, Maryland; that the various dates on which the said shipments were made appear on the statement attached to the amended complaint and that said statement is marked Exhibit "A" and made a part of said amended complaint; that said shipments were loaded in cars at the plant of the defendant at Gary, Indiana and delivered to Elgin, Joliet and Eastern Railway Company; that the Elgin, Joliet and Eastern Railway Company delivered said cars so loaded to the plaintiff herein to complete the transportation thereof to Baltimore, Maryland; that the consignee of the shipments, the Standard Wholesale Phosphate & Acid Works, Inc., deals in sulphate of ammonia; that the consignee is not owned or controlled by the defendant (consignor) and that the consignor and consignee are entirely separate and distinct corporations; that consignee's plant is located on the waterfront in the Curtis Bay District of Baltimore, Maryland, and includes two buildings built partly into or over the water of Curtis Bay, alongside of which buildings the cars containing the shipments in question were placed on tracks by the plaintiff; that these two buildings are used for storing, mixing and bagging commodities moving in both domestic and export commerce, and branch on to or abut wharves at which steamers are berthed for receiving and discharging cargoes; that the said shipments of sulphate of ammonia arrived in bulk and were unloaded from said cars through doors in the sides of said buildings and dumped into bins; that the said shipments of sulphate of ammonia were later placed in bags [fol.54] and handled through the doors in the ends of the building across short uncovered wharves or aprons and loaded into steamers alongside such wharves and exported; that the so-called domestic rate on sulphate of ammonia from Gary, Indiana to Baltimore, Maryland was published

in Jones' Tariff No. I.C.C.2123 and was 38.5¢ per 100 pounds; that the so-called export rate on sulphate of ammonia from Gary, Indiana to Baltimore, Maryland was published in Agent, Jones, Tariff No. I.C.C. 2123 at 28¢ per 100 pounds, and said tariff carried the following rule as Item Number 9322:

"The rates named in this tariff, or as same may be amended, and designated as 'export rates' will apply only on traffic delivered by the Atlantic Port Terminal carriers to the steamer or steamer's dock upon arrival at the port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of the export rates and also on traffic delivered to the party entitled to receive it at the carrier's seaboard stations to which export rates apply which traffic is handled direct from the carrier's stations to steamship docks and on which required proof of exportataion is given (CFA Inf. 8179.)"

that the defendant and said Elgin, Joliet and Eastern Railway Company, at the time of making each shipment, entered into a written contract or bill of lading to provide for the transportation of each of the shipments specified in said Exhibit "A," attached to the amended complaint; that each of said contracts or bills of lading provided that each of said shipments was for export, sometimes indicating that the shipment was for loading on vessel sailing from Baltimore, Maryland on certain specified dates; that each of said contracts or bills of lading, among other things, specified the following:

"Consigned to Standard Wholesale Phosphate & Acid Works, Inc.

"Destination—Curtis Bay—Baltimore, State of Maryland

"Route—EJ&E, Curtis, B&O—for export

"Freight rate—Prepaid 28¢ per 100# to Baltimore

"Switching rate—none

"J. L.—destination N. A. 5 for export to Porto Rico. Must go through to coast without transfer on account of liability of damage to contents consisting of sulphate of ammonia for fertilizer purposes."

that each of the Bills of Lading covering the shipments contained the following provision, signed by the defendant by one of its authorized employees:

[fol. 55] "If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: the carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Section 7 of Conditions.)

"Illinois Steel Company
"Per. —— ——
"Signature of consignor."

that each of said Bills of Lading contains the following: "If charges are to be prepaid, write or stamp here 'To be Prepaid.'" The words "To be Prepaid" were inserted by the defendant in the space provided at the time of the making of each such Bill of Lading; that each of said Bills of lading contains the following:

"Received $—— to apply in prepayment of the charges on the property described hereon. —— —— Agent of Cashier Per. —— —— (The signature here acknowledged only the amount prepaid.)"

that Section 7 of the Conditions of each of said Bills of Lading was as follows:

"Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which

may be found to be due after the property has been delivered to him. If the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped." [fol. 56] It is further stipulated and agreed that at the time of making each shipment the said Elgin, Joliet and Eastern Railway Company demanded freight thereon in the amount set forth under the heading "Amounts Paid By Defendant" in Exhibit "A" of the amended complaint herein, and that the defendants prepaid said amounts to said Elgin, Joliet and Eastern Railway as required by said contracts or bills of lading and that said Elgin, Joliet and Eastern Railway Company transported each of said shipments to Curtis, a point in the State of Indiana, and there delivered each of said shipments to the plaintiff, and that the plaintiff received, transported and delivered each of said shipments to Standard Wholesale Phosphate & Acid Works, Inc., at Curtis Bay, in the City of Baltimore in the State of Maryland; and that the plaintiff made delivery of said shipments without collection from the consignee, Standard Wholesale Phosphate & Acid Works, Inc., of any additional charges due or deemed by the plaintiff to be due on said shipments, or any of them; that said shipments and each of them moved in interstate commerce and that all the charges collected or to be collected thereon by the plaintiff were and are subject to the provisions of the Interstate Commerce Act; that at all of the times herein mentioned Section 16 (3) (a) provided as follows:

"All actions at law by carrier subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after."

Section 16 (3) (e) provided:

"The cause of action in respect of a shipment of property shall, for the purpose of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after."

that all of the shipments delivered to said Elgin, Joliet and Eastern Railway Company by the defendant for transportation prior to February 5, 1931, and shown on Exhibit "A" attached to the amended complaint, were delivered by the plaintiff at the destination specified in said bills of lading more than three years prior to the filing of the original complaint herein; that the plaintiff is not entitled to recover the balance of the charges alleged to be due on shipments [fol. 57] that were delivered more than three years prior to the institution of this suit; that the total freight charges at the export rate on the shipments delivered within three years prior to the institution of this suit was $9,801.93, which charges the defendant prepaid on said shipments; that the total freight charges on said shipments at the domestic rate was $13,477.45, a difference of $3,675.52; that if the court shall find that Section 7 of the Conditions of the Bills of Lading is not a bar to recovery by plaintiff from the defendant, then plaintiff is entitled to recover the sum of $3,675.52, being the amount due on the shipments delivered to the consignee within three years prior to the institution of this suit; if the court shall find that Section 7 of the Conditions of the Bills of Lading is a bar to recovery by the plaintiff from the defendant, then plaintiff is not entitled to recover.

Plaintiff's theory of the case is that Section 7 of the Conditions of the Bills of Lading can have no application to a prepaid shipment, particularly, under the facts and circumstances in this case, where the carriers, upon being advised that said shipments were for export, demanded payment of their charges in advance on the basis of the export rate, and had no notice or knowledge that said shipments, after delivery to consignee, would be so handled as to make inapplicable the export rate, and make applicable

the domestic rate; that under Section 7 of the Conditions of the Bills of Lading the carriers have a right to "require at time of shipment the prepayment or guarantee of the charges" and that the defendant could not deprive the carriers of this right of prepayment by the execution of the stipulation under Section 7 of the Conditions of the Bills of Lading. Defendant's theory of the case, as stated by plaintiff, is that having executed the stipulations on the bills of lading referred to in Section 7 of the Conditions of the Bills of Lading, and plaintiff having delivered the shipments contrary to such stipulations, has no recourse against the defendant, but must look to the consignee for any additional charges.

[fol. 58] The shipments of Sulphate of Ammonia were delivered by the defendant as shipper and consignor to the Elgin, Joliet and Eastern Railway at Gary, Indiana, consigned to the Standard Wholesale Phosphate & Acid Works, Inc., Baltimore, Maryland; and transported by that railroad and by plaintiff as terminal carrier. The shipments were made under uniform straight bills of lading in the forms prescribed by the Interstate Commerce Commission. At the time the shipments moved [and also today] there were two rates applicable to the shipments of this product from Gary to Baltimore, dependent upon whether the shipments were for export or domestic use. The rate on a shipment for export was and is lower than the rate on a shipment for domestic use. On each of the bills of lading issued upon the shipments involved here, the defendant signified that the shipment was for export, and that the freight charges thereon were to be prepaid. The defendant prepaid to the Elgin, Joliet & Eastern Railway the freight charges on each shipment from Gary to Baltimore at the export rate. The initial carrier demanded the prepayment of the freight charges in the amount set out in Exhibit "A" and defendant prepaid the amounts so demanded. The railroad tariff which published the export rate on Sulphate of Ammonia from Gary to Baltimore carried the following limitation upon the application of that rate:

"The rates named in this tariff, or as same may be amended and designated as 'export rates' will apply only on traffic delivered by the Atlantic Port Terminal carriers to the steamer or steamer's dock upon arrival at the port or after storage or transit has been accorded by the port

carrier at the port under tariffs which permit the application of the export rates and also on traffic delivered to the party entitled to receive it at the carrier's seaboard stations to which export rates apply, which traffic is handled direct from the carrier's stations to steamship docks and on which required proof of exportation is given."

It will be observed that each bill of lading specified that the merchandise was "consigned to Standard Wholesale Phosphate & Acid Works, Inc., destination, Curtis Bay, Baltimore, State of Maryland; route, EJ&E, Curtis, B&O, for export; freight rate, prepaid 28¢ per 100# to Baltimore; switching rate, none." The stipulation recites that the plaintiff received, transported and delivered "each of [fol. 59] said shipments to Standard Wholesale Phosphate & Acid Works, Inc., at Curtis Bay, Baltimore, Maryland; and that the plaintiff made delivery of said shipments without collection from the consignee, Standard Wholesale Phosphate & Acid Works, Inc., of any additional charges due or deemed by the plaintiff to be due on said shipments or any of them." In its brief plaintiff states that "the shipments in question, upon arrival at Baltimore, were not delivered either to the 'steamer or steamer's dock' or to the 'carrier's seaboard stations,' but on the contrary were delivered by the plaintiff upon the consignee's instruction at a building used by the consignee for storing, mixing and bagging commodities moving in both domestic and export commerce." Since the shipments as handled after delivery to consignee did not meet the tariff requirements for the application of the rate, plaintiff demanded that the defendant pay the domestic rate on the shipments and upon defendant's refusal to pay, the instant suit was brought for the difference between the total freight charges on the shipments at the domestic rate and the total freight charges prepaid by the defendant on the shipments at the export rate. The defendant pleaded that certain items were barred by the limitation of Section 16 (3) (a) that "all actions at law by carriers subject to this act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after." The stipulation disposed of this defense by providing that the total freight charges at the export rate on the shipments delivered within three years prior to the instant suit were $9,801.93, which the defendant prepaid, and that the total

freight charges on the shipments at the domestic rate were $13,477.45, a difference of $3,675.52, and that if the court found that Section 7 of the Conditions of the Bills of Lading was not a bar to recovery by plaintiff, then plaintiff was entitled to recover the sum of $3,675.52.

Each of the bills of lading under which these shipments moved contained the following provision: "If charges are [fol. 60] to be prepaid, write or stamp here, 'To Be Prepaid'." The words "To Be Prepaid" were inserted by the defendant in the space provided at the time of the making of each bill of lading, and the charges on each shipment were prepaid by the defendant to the initial carrier at the export rate. Each of the bills of lading had this further provision which was signed by the defendant:

"If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Section 7 of Conditions.)"

The pertinent portion of Section 7 of the Conditions of the Bills of Lading is as follows:

"Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates by signature, in the space provided for that purpose on the face of this bill of lading, that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges, * * * Nothing herein shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading the freight charges must be paid upon the articles actually shipped."

It will be noted that the shipments were exported by the consignee. Plaintiff contends that the method of handling the shipments at destination by the consignee made the export rate inapplicable and resulted in the additional charge. By their stipulation, the parties have eliminated any controversy about the claim of the railroad for the additional charges, apparently recognizing that the shipments were not handled at the point of delivery in Baltimore in such a manner as to entitle them to the export rate. Defendant contends that because of the "no recourse" clause in the bill of lading plaintiff cannot prevail in its attempt to collect the undercharge from it. Plaintiff maintains that the trial court erred in finding the issues for defendant. To sustain the judgment, defendant asserts (1) the plaintiff, [fol. 61] having failed to perform its contract by delivering the property without collection of the freight charges and all other lawful charges, is not entitled to recover from the consignor; (2) that the defendant has complied fully with the contract of transportation; that plaintiff cannot recover against the defendant in the absence of a showing that defendant has been guilty of a breach of the contract in some respect; (3) that the bill of lading contracts, including the "no recourse" clause and Section 7 of the Conditions of said bill of lading, were valid, lawful, binding and enforceable contracts; (4) that although plaintiff has no recourse against the defendant in this case, the consignee, by accepting delivery of the property, became liable to the plaintiff for the charges and its liability satisfies requirements of the Interstate Commerce Act; (5) that there is no inconsistency resulting from the prepayment by the consignor of a portion or all of the charges at the export rate as shown on the face of the uniform bill of lading and the execution by the consignor of the "prepay" and the "no recourse" clauses in the bill of lading; that the consignor may prepay all or any part of the charges, and that the protection of the "no recourse" clause is not limited to "collect" shipments; and (6) that the very purpose of the executed "no recourse" clause is to protect the consignor from liability for freight and other charges, including subsequently discovered undercharges, in the event that the carrier, contrary to the provisions of said clause, parts with possession of the property without collecting all charges due the carrier; that the "no recourse" clause provides that if the

carrier wishes to hold the consignor liable for the charges, the carrier must retain possession of the property until all the charges thereon have been paid; and that if the carrier makes delivery of the property without collecting all of said charges, the carrier can no longer hold the consignor liable, but thereafter must look solely to the consignee for payment of any unpaid charges.

The courts have uniformly held that it is the duty of the [fol. 62] carrier to collect its lawful charges. Section 6 (7) Title 49 of the United States Code provides that no carrier shall engage in or participate in the transportation of passengers or property unless the rates, fares and charges have been filed and published in accordance with the provisions of that chapter, and that no carrier shall charge, demand, collect or receive a greater or less or different compensation for such transportation, or for any service in connection therewith between the points named in such tariff, than the rates, fares and charges which are specified in the tariff filed and in effect at the time, and that no carrier shall refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities except such as are specified in such tariffs. Section 41 of this Code provides that the willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor. In *Davis* v. *Keystone Steel & Wire Co.*, 317 Ill. 278, the court said (288):

"The terms of every contract of shipment, so far as the service to be rendered and the compensation to be received are concerned, are fixed by the schedule filed with and approved by the Interstate Commerce Commission. No agreement of the parties can modify these terms, though expressed in writing and actually performed. The collection by the carrier of less than the schedule rate, though expressly agreed on, will not prevent the recovery of the shortage from the schedule rate. The rates defined by the tariff cannot be varied or enlarged by either contract or tort by the carrier."

In *L. & N. R. R. Co.* v. *Central Iron Co.*, 265 U. S. 59, Mr. Justice Brandeis, speaking for the Supreme Court, said (65):

"The shipment being an interstate one, the freight rate was that stated in the tariff filed with the Interstate Commerce Commission. The amount of the freight charges legally payable was determined by applying this tariff to the actual weight. Thus, they were fixed by law. No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who had assumed an obligation to pay the charges."

The Interstate Commerce Commission does not purport to determine upon whom the liability to pay transportation [fol. 63] charges shall fall. This is a matter of contract in no way controlled by the Interstate Commerce Commission. The Interstate Commerce Act is not concerned with who shall pay the transportation charges. It permits the carrier to make any contract it may see fit with reference to who shall pay the charges. Its only purpose is to prevent discrimination and rebates. It prohibits the application of any act or conduct as estopping a carrier from exacting the lawful freight rate. (*The Alton Railroad Company* v. *Gillarde*, 379 Ill. 308, 313.) In the *Central Iron Company case*, the Federal Supreme Court said (65):

"But delivery of goods to a carrier for shipment does not, under the Interstate Commerce Act, impose upon a shipper an absolute obligation to pay the freight charges. The tariff did not provide when or by whom the payment should be made. As to these matters carrier and shipper were left free to contract, subject to the rule which prohibits discrimination. The carrier was at liberty to require prepayment of freight charges; or to permit that payment to be deferred until the goods reached the end of the transportation. *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 656. Where payment is so deferred, the carrier may require that it be made before delivery of the goods; or concurrently with the delivery; or may permit it to be made later. • • • To ascertain what contract was entered into we look primarily to the bills of lading, bearing in mind that the instrument serves both as a receipt and as a contract. Ordinarily, the person from whom the goods are received for shipment assumes the obligation to pay the freight charges; and his obligation is ordinarily a primary one. This is true even where the bill of lading contains, as here, a provision imposing liability upon the consignee. For the shipper is presumably the consignor; the transpor-

tation ordered by him is presumably on his own behalf; and a promise by him to pay therefore is inferred (that is, implied in fact), as a promise to pay for goods is implied, when one orders them from a dealer. But this inference may be rebutted, as in the case of other contracts. It may be shown, by the bill of lading or otherwise, that the shipper of the goods was not acting on his own behalf; that this fact was known to the carrier; that the parties intended not only that the consignee should assume an obligation to pay the freight charges, but that the shipper should not assume any liability whatsoever therefor; or that he should assume only a secondary liability."

In a footnote on page 66 in the *Central Iron Company* case, the Supreme Court added:

"See Interstate Commerce Commission Conference Ruling No. 314, Bulletin No. 7, issued August 1, 1917: 'The law requires the carrier to collect and the party legally responsible to pay the lawfully established rates without deviation therefrom. It follows that it is the duty of carriers to exhaust their legal remedies in order to collect undercharges from the party or parties legally responsible therefor. It is not for the Commission, however, to determine in any case which party, consignor or consignee, is legally liable for the undercharge, that being a question determinable only by a court having jurisdiction and upon the facts of each case.' This ruling which was adopted May 1, 1911 and 'interpreted' May 4, 1918, was amended, on March 6, 1922, by calling attention to the provision inserted in the Uniform Domestic Bill of Lading prescribed October 21, 1921. By that provision the consignor may (see Section 7 of Condi-[fol. 64] tions and clause on face of bill) relieve himself of all liability for freight charges. In the Matter of Bills of Lading, 52 I. C. C. 671, 721; 64 I. C. C. 347; ibid, 357; 66 I. C. C. 63."

In a case entitled In the Matter of Bills of Lading, I. C. C. Docket No. 4844, decided April 14, 1919, 52 I. C. C. 671, the Commission prescribed uniform bills of lading, including the form of domestic straight bill of lading. Speaking of the "no recourse" clause, the Commission said:

"In order to secure exemption from liability for the freight charges in case the shipment is delivered to the

consignee without the collection of such charges, the consignor is required to append his signature to the following statement in a space on the face of the bill of lading for that purpose: 'The carrier shall not make delivery of this shipment without payment of freight and other lawful charges.' "

In the case of *Michigan Central R. R. Co.* v. *Saginaw Milling Co.*, 262 N. W. 425, (272 Mich. 625), the Supreme Court of Michigan said (426):

"The purpose of the nonrecourse clause is to relieve the the consignor of liability and its presence in an order bill of lading, when properly executed, should be given effect. The carrier and the shipper are left free to contract subject to the rule which prohibits discrimination."

In the case entitled In the Matter of Bills of Lading, 52 I. C. C. 671, 721, the Interstate Commerce Commission said:

"A primary right of the carrier in the conduct of its business is that of reasonable compensation for the service rendered by it, and it is entitled to assure itself of such compensation by demanding it in advance."

There is no contention that the defendant committed any fraud. Both plaintiff and defendant believed in good faith that the shipments would be exported, and the bills of lading bore a notation that they were for export. Plaintiff accepted the charges paid to the initial carrier in accordance with the directions on the bills of lading, and it had no knowledge until after the shipments had been delivered to the consignee at Baltimore that the provisions of the export tariff would not be complied with and that the domestic rate would be the only rate legally applicable to the shipments. Defendant invokes the "no recourse" provision of Section 7 of the Conditions of the Bills of Lading. Plaintiff's posi- [fol. 65] tion is that the "no recourse" provision is limited to "collect" shipments, and does not relate to "prepaid" shipments, where the consignor has expressly undertaken to prepay the freight. Defendant contends that there is no inconsistency resulting from the prepayment by the consignor of a portion or all of the charges at the export rate as shown on the face of the bills of lading and the execution by the consignor of the "prepay" and of the "no recourse"

clauses, and that the protection of the "no recourse" clause is not limited to "collect" shipments. Defendant points out that it is a general principle of construction that, if possible, an instrument should be construed as to give effect to all of its provisions, and that in this case it is possible to give effect to both the "prepay" and the "no recourse" clauses because the shipper, in effect, stated that it had a shipment to Puerto Rico, and wished to prepay the charges to Baltimore; that it asked the carrier how much the charges would be; that on being informed the charges would be 28¢ per 100 pounds to Baltimore the shipper agreed to prepay the amount thus demanded; that to protect itself from liability for any additional charges which might accrue over and above those which the defendant by its sales contract with the consignee and by its transportation contract with the initial carrier had agreed to pay, the consignor in executing the bill of lading also signed the "no recourse" clause, which meant the carrier could not have recourse upon the consignor if it delivered the property without collecting all of the charges lawfully due. Defendant also contends that the very purpose of the executed "no recourse" clause is to protect the consignor from liability for freight and other charges, including subsequently discovered undercharges in the event that the carrier, contrary to the provisions of the clause, parts with possession of the property without collecting all charges due the carrier. Defendant points out that although the carrier has no recourse against the defendant, the consignee, by accepting delivery of the property became liable to the carrier for the charges, and its liability satisfies the requirements of the Interstate Commerce Act.

[fol. 66] Section 7 of the Conditions of the Bills of Lading provides that the consignor "shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges, and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges." Further along in Section 7 appears the following: "Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges." It is clear that in the bill of

lading the carrier reserves the right to demand prepayment of its charges. Having this right, it follows that the shipper is obligated to pay such charges where the demand is made. Each bill of lading carried the provision signed by the shipper that "the carrier shall not make delivery of this shipment without payment of freight or all other lawful charges." It is evident that the language "nothing herein shall limit the right of the carrier to require at time of shipping the prepayment or guarantee of the charges," limits the right of the shipper in the exercise of the privilege granted by the "no recourse" clause. It is obvious that if nothing shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges, the "no recourse" clause could not be construed as giving the shipper the right to deprive the carrier of its charges. In the *Central Iron Company* case the Supreme Court pointed out that the carrier was at liberty to require prepayment of the freight charges. Our inquiry then should be directed to ascertaining whether the carrier did exercise its right to require at the time of each shipment the prepayment of the charges. It will be observed that each of the bills of lading contains the following: "If charges are to be prepaid, write or stamp here 'To Be Prepaid.'" The [fol. 67] words "To Be Prepaid" were inserted by the defendant in the space provided at the time of making each bill of lading. The parties stipulated that at the time of making each shipment the initial carrier demanded the freight thereon in the amount set forth under the heading: "Amounts paid by defendant" in Exhibit "A" of the amended complaint, and that the defendant prepaid said amounts to the initial carrier as required by the bill of lading, and that the initial carrier transported each of the shipments to Curtis, Indiana and there delivered each of the shipments to the plaintiff. The stipulation further provides that "the total freight charges at the export rate on the shipments delivered within three years prior to the institution of this suit was $9,801.93, which charges the defendant prepaid on said shipments; that the total freight charges on said shipments at the domestic rate was $13,477.45, a difference of $3,675.52." This sum of $3,675.52 is the difference between the export rate and the domestic rate. No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who has assumed an obligation to pay the charges. The initial carrier insisted

on the payment of the charges. This carrier did not demand payment of part of the charges. It did not demand payment of charges on account. The initial carrier could not demand payment of the domestic rate until it appeared that the shipments would not take the export rate. Each bill of lading recited that the merchandise was "for export," and that the freight rate was prepaid at 28¢ per 100 pounds to Baltimore. The parties knew that this was the export rate. It is plain that the initial carrier was demanding and the shipper was prepaying the charges, and that each understood that the export rate was applicable. Following the direction of the bill of lading that "if the charges are to be prepaid, write or stamp here 'To Be Prepaid,' " the words "To Be Prepaid" were inserted by the defendant in the space provided at the time of making each such shipment. We are satisfied that when the initial carrier demands that [fol. 68] the charges be prepaid, which it has a clear right to do, that the "no recourse" clause is not applicable. Defendant points out that the shipper has the right to prepay any part or all of the charges if he wishes, and that it is a common practice for the consignor to prepay part of the charges and for the carrier to collect the remainder of the charges from the consignee. Nevertheless, the carrier can insist upon its right to require prepayment of its charges. Where a carrier accepts part payment of its charges from the consignor, that, of course, would not be a prepayment. At most it would be a prepayment of part of the charges. In a case where the railroad company accepted part payment of the charges and the shipper signed the "no recourse" stipulation, we are of the opinion that this stipulation would be effective to protect the shipper as to the balance of the charges. In such a situation it is manifest that the carrier would not be demanding prepayment of its charges. It would be a contradiction to say that the railroad company insisted on the charges being prepaid and that the shipper could not be required to pay any deficiency if the proper charges were not collected. When a shipper is required to prepay the charges, that means he is to pay all of the charges applicable to the merchandise being moved. The initial carrier required defendant to prepay the charges. In our opinion the charges which defendant agreed to pay were whatever charges were applicable to the commodity. We are of the opinion that the "no recourse" clause is not applicable to the situation covered by the stipulation.

Referring to the clause that "if upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid on the articles actually shipped," plaintiff contends that defendant described the goods as being for export, when in fact they were domestic goods under the carrier's tariff, and that the change in character did not reveal itself until the goods had been delivered to the consignee and could not possibly have been known to plaintiff until the delivery had been [fol. 69] made. This is not a case of misdescription.

While it is true that the commodity shipped was Sulphate of Ammonia and that Sulphate of Ammonia was shipped, the export rate was applied on the assumption that the handling of each shipment would be in accordance with the tariff regulation. Plaintiff had no control over the handling of each shipment after it was delivered to the consignee at Baltimore. Defendant, in selling its product, had the opportunity to contract with the purchaser so as to protect iteslf by requiring that each shipment be handled so that the export rate would be applicable. Defendant states that it prepaid the charges on the shipment at the export rate and that it had no way of knowing what might happen to the shipment after delivery at Baltimore. Plaintiff points out that if the defendant did not know what the consignee might do with the shipment, how was it (plaintiff) to know? The shipping instructions from the defendant directed that delivery be made to the Wholesale Phosphate & Acid Works, Curtis Bay, Baltimore, Maryland, for export. These instructions were carried out and delivery made as directed. There were no additional charges due up to the time of delivery. We agree with the plaintiff that it would be unreasonable to expect that plaintiff should have anticipated that the consignee might not comply with the export tariff and should have withheld delivery, although the freight charges had been paid. Plaintiff required the payment of its charges at the time of shipment. At that time the defendant designated the shipments as for export and defendant prepaid the charges at the export rate. A subsequent examination as to the handling of the shipments revealed that the export rate was not applicable. A fundamental error in defendant's reasoning is that it fails to appreciate that the carrier has the right to insist upon the prepayment or guarantee of the charges, for by the express terms of Section 7 of the Conditions of the Bills

of Lading, nothing therein "shall limit the right of the carrier to require at the time of shipment the prepayment [fol. 70] of guarantee of the charges." Where the carrier manifests an intention to demand prepayment of the charges, the signing of the "no recourse" stipulation by the shipper is ineffective. Defendant suggests that if it had been the intention of the framers of the Uniform Bill of Lading to make the "no recourse" clause inapplicable to shipments marked "To Be Prepaid," they would have expressly provided in Section 7 that the "no recourse" clause should not apply in cases where the prepaid clause of the bill of lading has been executed. Defendant insists that both the "prepaid" and "no recourse" clauses can be given effect and that the court should construe the bill of lading contract so as to give effect to all of its provisions. The law requires a shipper to pay all of the charges in advance if demand therefor is made by the carrier. Delivery of the shipment does not change the primary obligation of the shipper to pay the charges. Where the carrier insists on prepayment of the charges the shipper cannot by signing the "no recourse" stipulation, avoid its obligation to pay all of the charges, and if through some mistake all of the charges are not collected in advance, the liability of the shipper to pay persists. Counsel for the defendant submitted to us a copy of an opinion filed November 10, 1942 in the United States District Court for the District of Minnesota, Fourth Division, in the case of *Chicago Great Western Railway Co.* v. *Hopkins et al.*, No. 497 Civil. While this opinion is in point on the issues before us, we do not agree with the reasoning or the result.

We are of the opinion that the "no recourse" clause of the Conditions of the Bill of Lading was not applicable to the shipments of Sulphate of Ammonia, and that plaintiff is entitled to recover the difference between the domestic rate and the export rate on the shipments delivered within three years prior to the institution of the suit, of $3,675.52 Therefore, the judgment of the Superior Court of Cook [fol. 71] County is reversed and the cause remanded with directions to enter a judgment for the plaintiff and against defendant in the sum of $3,675.52 and costs.

Reversed and Remanded With Directions

Hebel, J, and
Kiley, J, Concur.

[fol. 72] And afterwards, on the same day to-wit: the 9th day of December A. D. 1942, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 73] No. 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

On this day came again the said parties, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned, for error, and being now sufficiently advised of and concerning the premises, on a rehearing in said cause are of the opinion that in the record and proceedings aforesaid, and in the rendition of the Judgment aforesaid, there is manifest error: Therefore, it is considered by the Court that for that error, and others in the record and proceedings aforesaid, the Judgment of the Superior Court of Cook County in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the Superior Court of Cook County with directions to said Superior Court to enter a judgment for the plaintiff and against defendant in the sum of $3,675.52 and costs. And it is further considered by the Court that the said Appellant recover of and from the said Appellee its costs, by it in this behalf expended to be taxed, and that it have execution therefor.

[fol. 74] And afterwards, on the 6th day of January A. D. 1943, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 75] IN RE PUBLICATION OF WRITTEN, Decisions of this Court:

It is hereby ordered that the cases, the numbers and titles of which are given below, the written decisions of this Court filed the 9th day of December A. D. 1942, shall be published in full in the Appellate Court Reports.

And the decisions so filed which are not designated below shall be published by including an adequate abstract of such written decisions. 42145. B. & O. R. R. Co. v. Illinois Steel Co.

And afterwards, on the 13th day of January A. D. 1943, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 76] No. 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

The Court having considered the motion of Appellee that the issuance of the mandate herein be stayed until the time for the filing of a petition in ... Supreme Court of Illinois for leave to appeal to review the judgment of this Court in said cause shall have expired, or if such petition shall have been filed within the proper time, then until said petition shall have been granted or refused; and the Court, being fully advised in the premises, doth grant said motion and doth order that the issuance of the mandate in said cause be and the same is hereby stayed accordingly.

And afterwards, on the same day to-wit: the 13th day of January A. D. 1943, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 77] 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

The Court having considered the motion of Illinois Steel Company, a corporation, Appellee in this cause and Defend-

ant in the Superior Court of Cook County, for the issuance of the Certificate of this Court that there is fairly involved in the claim of The Baltimore and Ohio Railroad Company, a corporation, Appellant in said cause and Plaintiff in the Superior Court of Cook County more than Fifteen Hundred Dollars ($1,500.00) as per reasons and affidavit filed herein. And the Court being fully advised in the premises, are of the opinion and Therefore Certify that more than Fifteen Hundred Dollars ($1,500.00) is fairly involved in the claim of The Baltimore and Ohio Railroad Company, a Corporation, Appellant herein and Plaintiff in the Superior Court of Cook County.

Joseph Burke, Oscar Hebel, Roger J. Kiley, Justices of the Third Division, Appellate Court, First District, Illinois.

[fol. 78] And afterwards, on the 19th day of March, A. D. 1943, it being one of the days of the February Term A. D. 1943, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 79] 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant,

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

The Court having considered the motion of Appellee that the issuance of the mandate herein be stayed until the time for the filing of a petition in the Supreme Court of the United States for a writ of certiorari to review the judgment of this Court in said cause shall have expired without any such petition having been filed, and if such petition for said writ shall have been filed within the proper time, then until said writ of certiorari shall have been granted or refused; and the Court, being fully advised in the premises, doth grant said motion and doth order that the issuance of the mandate in said cause be and the same is hereby stayed accordingly.

And afterwards, on the 22nd day of March A. D. 1943, there was filed in the Office of the Clerk of said Appellate

Court, a certified copy of an order of the Supreme Court of Illinois, denying the petition for leave to appeal in said cause, which said order is in the words and figures following, to-wit:

[fol. 80] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of March in the year of our Lord, one thousand nine hundred and forty-three, within and for the State of Illinois.

Present: Clyde E. Stone, Chief Justice; Justice Francis S. Wilson, Justice Loren E. Murphy, Justice William J. Fulton, Justice Walter T. Gunn, Justice June C. Smith, Justice Charles H. Thompson, George F. Barrett, Attorney General; Warren C. Murray, Marshal.

Attest: Edward F. Cullinane, Clerk pro tempore.

Be It Remembered, that, to-wit: on the 11th day of March 1943, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

No. 27104

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Respondent

vs.

ILLINOIS STEEL COMPANY, a Corporation, Petitioner

Petition for Leave to Appeal from Appellate Court

First District. 34S.1752-42145

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Edward F. Cullinane, Clerk pro tempore of the Supreme Court of the State of Illinois and keeper of records,

files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 20th day of March A. D. 1943.

Edward F. Cullinane, Clerk pro tempore, Supreme Court of the State of Illinois. (Seal.)

[Endorsed:] 42145. No. 27104. Supreme Court of Illinois. The Baltimore and Ohio R. R. Co., etc., Respondent vs. Illinois Steel Co., etc., Petitioner. Denial Petition. Leave to Appeal. Filed Appellate Court. Mar. 22, 1943. Sheldon W. Govier, Clerk.

[fol. 81] I, Sheldon W. Govier, Clerk of the Appellate Court, in and for the First District of the State of Illinois and keeper of the records, files and seal thereof, Do Hereby Certify that the foregoing pages numbered 1 to 24 inclusive, are a true copy of the Abstract of Record filed by the Appellant in the case of The Baltimore and Ohio Railroad Company, a corporation, vs. Illinois Steel Company, a Corporation, in said Appellate Court on January 13th A. D. 1942.

I further certify that the foregoing pages 25 to 79 are a true, full and complete Transcript of the Record of proceedings of said Appellate Court in the case of The Baltimore and Ohio Railroad Company, a corporation, vs. Illinois Steel Company, a Corporation, of record in my office, and also of the opinions of said Appellate Court rendered herein and filed in said cause on the 3rd day of July A. D. 1942 and on the 9th day of December A. D. 1942, and also a certified copy of the order of the Supreme Court of Illinois denying Leave to Appeal in said cause which was filed in said Appellate Court on the 22nd day of March A. D. 1942, in said cause, as all of the same now apear on file in my office.

In Testimony Whereof, I have set my hand and affixed the seal of the said Appellate Court, Illinois, First District, at Chicago, Illinois, this 25th day of March in the year of our Lord One Thousand Nine Hundred and Forty-three.

Sheldon W. Govier, Clerk of the Appellate Court, First District, Illinois. (Seal.)

ORDER ALLOWING CERTIORARI.—Filed October 11, 1943

The petition herein for a writ of certiorari to the Appel-ate Court of the State of Illinois, First District, is granted.

And it is further ordered that the duly certified copy of he transcript of the proceedings below which accompanied he petition shall be treated as though filed in response to uch writ.

Endorsed on Cover: Enter Paul R. Conaghan. File No. 7,591. Illinois, Appellate Court, First District. Term No. 9. Illinois Steel Company, Petitioner, vs. Baltimore and Ohio Railroad Company. Petition for a writ of certiorari nd exhibit thereto. Filed June 11, 1943. Term No. 99, O. T. 1943.